No. 96-1462

(H)

IN THE

Supreme Court of the United States

October Term, 1996

CHRISTOPHER H. LUNDING, BARBARA J. LUNDING,

Petitioners,

-v.-

TAX APPEALS TRIBUNAL OF THE STATE OF NEW YORK, COMMISSIONER OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF RESPONDENT COMMISSIONER OF TAXATION AND FINANCE

DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Respondent Commissioner of Taxation and Finance
The Capitol
Albany, NY 12224
(518) 474-5487

BARBARA G. BILLET
Solicitor General and Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

ANDREW D. BING
Assistant Attorney General

Of Counsel

THE REPORTER COMPANY AND THE WALTON REPORTER, INC.
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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether New York's income tax treatment of alimony paid by petitioners, who were New York nonresidents, was consistent with the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution where substantial reasons existed justifying New York's different tax treatment of alimony paid by residents and nonresidents, to wit (i) New York residents were taxed on their income from all sources, while petitioners as nonresidents were taxed only on their income earned in New York, and their payments of alimony were not connected with the production of their New York income, and (ii) the alimony payments were intimately connected to petitioners' personal and family activities outside New York.

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STATEMENT OF THE CASE

This case involves New York State's personal income tax treatment of alimony paid by nonresidents. In 1989, petitioner

Christopher H. Lunding was divorced from his wife (18a)[1]. A separation agreement requiring that he pay his former wife $108,000 in alimony during 1990 was incorporated into the judgment dissolving the marriage (18a-19a). Later in 1989, he married petitioner Barbara J. Lunding (19a).

During 1990, petitioners resided in Connecticut (18a). Petitioner Christopher H. Lunding was a New York-based partner in a law firm partnership with offices in New York City and other cities in the United States and abroad (17a). On their 1990 New York nonresident tax return, petitioners reported a federal adjusted gross income of $788,210, including an adjustment[2] of $108,000 for the full amount of alimony paid (2a). They further reported a New York adjusted gross income of $350,488 (19a). This sum included an adjustment of $51,934, representing the $108,000 in alimony multiplied by .480868, which was the percentage of Christopher Lunding's 1990 total business income which petitioners reported as derived from or connected with New York sources (17a). Relying on New York Tax Law § 631(b)(6) (McKinney 1987) ("Tax Law"), respondent Commissioner of Taxation and Finance ("respondent") disallowed the alimony adjustment, increasing petitioners' New York source income by $51,934 (18a). Respondent issued a Notice of Deficiency against petitioners for the resulting tax deficiency of $3,724, exclusive of interest (18a).

[1]Parenthetical citations consisting of a number are to pages in the Record on Appeal in the New York Court of Appeals. Parenthetical citations consisting of a number followed by "a" are to pages in the appendices to the petition for certiorari. A Joint Appendix has been dispensed with by order of this Court dated June 23, 1997.

[2]The Internal Revenue Code refers to alimony as a "deduction." 26 U.S.C. §§ 62(a)(10), 215(a). The New York Tax Law also refers to alimony as a deduction. N.Y. Tax Law § 631(b)(6) (McKinney 1987). Alimony and other deductions listed in 26 U.S.C. § 62 (defining adjusted gross income) were also called "adjustments to income" on the 1990 New York State nonresident income tax form filed by petitioners.

Under New York's personal income tax, New York residents are taxed on their income from New York and non-New York sources[3] but nonresidents are liable for tax on only "[t]he net amount of items of income, gain, loss and deduction * * * derived from or connected with New York sources." Tax Law § 631(a). The Tax Law provides that "[t]he deduction allowed by section two hundred fifteen of the internal revenue code, relating to alimony, shall not constitute a deduction derived from New York sources." Tax Law § 631(b)(6).[4]

[3]Tax Law § 601(a), (b) and (c) imposes a tax on the New York taxable income of New York residents. Tax Law § 611(a) defines the New York taxable income of a resident by reference to his New York adjusted gross income, which Tax Law § 612(a) defines by reference to the resident's federal adjusted gross income. The Internal Revenue Code defines adjusted gross income for federal income tax purposes by reference to gross income, which includes income "from whatever source derived." 26 U.S.C. §§ 62(a), 61(a).

[4]New York's personal income tax treatment of nonresidents' alimony has varied between the time the deduction entered the Tax Law in 1943 and the enactment of the present scheme in 1987. *See* N.Y. Laws of 1943, c. 245, § 3 (alimony deduction allowed only if recipient subject to New York taxation, with the Department of Taxation and Finance construing the deduction as available only to residents, Letter of Rollin Browne, Commissioner of Taxation and Finance, to Governor Dewey, dated March 9, 1944, pp 1-2 [Governor's Bill Jacket, N.Y. Laws of 1944, c. 333]); N.Y. Laws of 1944, c. 333, § 2 (alimony deduction allowed to residents without regard to whether recipient is taxable in

On June 10, 1992, petitioners filed an administrative petition with the Division of Tax Appeals of the New York Department of Taxation and Finance, contending that Tax Law § 631(b)(6) violated the Privileges and Immunities, Equal Protection, and Commerce Clauses of the United States Constitution (25a-26a). Respondent duly answered (94-95), and the parties agreed to have the controversy determined without a hearing (25a). On April 28, 1994, the administrative law judge (the "ALJ") issued a determination (25a-34a) concluding that the Division of Tax Appeals lacked jurisdiction over facial challenges to the constitutionality of a statute (32a) and denying the petition (34a).

Petitioners filed a notice of exception to the ALJ's determination with the Tax Appeals Tribunal ("the Tribunal") (16a). They conceded that the Tribunal lacked jurisdiction over challenges to the facial constitutionality of a statute (23a). On February 23, 1995, the Tribunal issued a decision affirming the ALJ's determination (16a-24a). By notice of petition dated June 15, 1995, petitioners commenced the present proceeding before the New York Supreme Court, Appellate Division, Third Depart-

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New York and to nonresidents only if recipient is taxable in New York); N.Y. Laws of 1961, c. 68, § 1 (itemized deductions, then including alimony, generally allowed to nonresidents in proportion to the part of their total income derived from New York sources). *See also Matter of Friedsam v. State Tax Commission*, 64 N.Y.2d 76, 473 N.E.2d 1181, 484 N.Y.S.2d 807 (1984) (nonresidents allowed proportional alimony deduction under pre-1987 law); *see generally* J. Murphy and A. Petite, *Taxation of Nonresidents by New York State*, 12 Syr. L. Rev. 147, 152 (1960); M. Solomon, *Nonresident Personal Income Tax: A Comparative Study in Eight States*, 29 Fordham L. Rev. 105, 118 (1960); Nonresident Tax Study Committee, *Report on Taxation of Nonresidents by New York State* (1959).

ment, challenging the Tribunal's decision pursuant to Tax Law § 2016 (97-109).[5]

In its decision, the Appellate Division followed its earlier decision in *Matter of Friedsam v. State Tax Commission*, 98 A.D.2d 26, 470 N.Y.S.2d 848 (3d Dept. 1983), *aff'd on other grounds*, 64 N.Y.2d 76, 473 N.E.2d 1181, 484 N.Y.S.2d 807 (1984), and declared that Tax Law § 631(b)(6) was unconstitutional because it violated the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution. 218 A.D.2d 268, 639 N.Y.S.2d 519 (3d Dept. 1996) (11a-15a). Accordingly, the court annulled the decision of the Tax Appeals Tribunal (15a). The court did not address petitioners' Equal Protection and Commerce Clause arguments.

Respondent appealed the Appellate Division's decision to the New York Court of Appeals (125-126). In its decision, the Court of Appeals reversed the Appellate Division and held that Tax Law § 631(b)(6) was constitutional. 89 N.Y.2d 283, 675 N.E.2d 816, 653 N.Y.S.2d 62 (1996)(1a-10a). The Court relied on this Court's decisions in *Shaffer v. Carter*, 252 U.S. 37 (1920), and *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), where, the Court observed, this Court "established that limiting taxation of nonresidents to their in-State income was a sufficient justification for similarly limiting their deductions to

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[5]Tax Law § 2016 provides that the Tax Appeals Tribunal and the Commissioner of Taxation and Finance must be designated as respondents in the proceeding for judicial review of the Tribunal's decision, but that the Tribunal shall not participate in such proceeding. Accordingly, respondent Tax Appeals Tribunal of the State of New York has not participated in this proceeding and will not file a brief or otherwise participate in the proceeding in this Court.

expenses derived from sources producing that in-State income" (5a). The Court acknowledged that a state could not tax the income of nonresidents working in the state while exempting its own residents from tax, *Austin v. New Hampshire*, 420 U.S. 656 (1975), nor deny to nonresidents the personal exemptions available to residents. *Travis, supra* (6a). However, the Court noted that this Court's precedents permitted disparity in tax treatment of residents and nonresidents "where there are perfectly valid independent reasons for it," *Toomer v. Witsell*, 334 U.S. 385, 396 (1948), and that the Privileges and Immunities Clause was not violated where there was a substantial reason for the difference in treatment and the discrimination practiced against nonresidents bore a substantial relationship to the state's objective. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985) (6a-7a).

The Court found that two relevant substantial reasons justifying different tax treatment of personal nonbusiness expenses incurred by residents and nonresidents had been articulated in the decision of the Appellate Division in *Matter of Goodwin v. State Tax Commission*, 286 App. Div. 694, 146 N.Y.S.2d 172 (3d Dept. 1955), *aff'd*, 1 N.Y.2d 680, 133 N.E.2d 711, 150 N.Y.S.2d 203 (1956), *appeal dismissed for want of a substantial federal question*, 352 U.S. 805 (1956), upholding New York's disallowance of a nonresident's deductions for New Jersey real estate taxes, interest payments, medical expenses and life insurance premiums (7a). First, New York residents, unlike nonresidents, were subject to the burden of taxation on their worldwide income and, therefore, were entitled to the offsetting benefit of full deductions. Second, the disallowance was appropriate because the expenses were personal expenses of the taxpayer, which were not incurred in connection with the production of the New York income and which were

clearly a part of his personal activities in his home state, where the deduction, if any, should be allowed (7a).

Based upon its analysis of the governing law, the Court held that Tax Law § 631(b)(6) did not violate the Privileges and Immunities Clause (8a). The Court found the *Goodwin* court's statement of the substantial reasons justifying the disallowance of nonresidents' personal deductions generally to be equally applicable to the treatment of alimony. The Court concluded that the disparate tax treatment of alimony paid by a nonresident was fully justified in light of the disparate treatment of income: nonresidents are taxed only on income earned in New York, while residents are taxed on their income from all sources. The Court viewed the advantage granted residents regarding the alimony deduction as offset by the additional burden of being taxed on their worldwide income (8a).

The Court also concluded that the disallowance of the nonresidents' alimony deduction is substantially justified by the fact that a nonresident's alimony payments are, like the property taxes on an out-of-state residence involved in *Goodwin*, wholly linked to personal activities outside New York having nothing to do with the generation of New York income (8a-9a). Accordingly, the Court determined that the approximate equality of tax treatment required by the Constitution was satisfied, and greater fine tuning in New York's tax scheme was not constitutionally mandated (9a).

Finally, the Court determined that the absence of any legislative history regarding the substantial reasons justifying the tax treatment of nonresidents' alimony deductions did not undermine the validity of the statute (9a). The Court found that where, as here, "substantial reasons for the disparity in tax treatment are

apparent on the face of the statutory scheme, absence of a statement at the time of enactment will not invalidate the statute" (9a).

SUMMARY OF ARGUMENT

New York's personal income tax treatment of petitioners' alimony payments does not violate the Privileges and Immunities Clause because such treatment is substantially related to substantial governmental reasons. First, the disparate tax treatment of alimony paid by a nonresident is justified in light of the disparate treatment of income. Under long-established precedents of this Court, a state may limit the nonresident's expenses, losses and other deductions to those incurred in connection with the production of income within the state because the state may tax a nonresident only on the portion of his income attributable to the state. In contrast, a resident is subject to tax on income from all sources. Additionally, New York may validly deny the alimony deduction to a nonresident while allowing it to New York residents, because a nonresident's alimony payments are personal expenses related to the nonresident's life in his home state which has nothing to do with New York. New York is not obligated to make personal deductions such as alimony available to a nonresident in calculating his New York source income. Given these several justifications, the substantial equality of treatment required by the Privileges and Immunities Clause is satisfied.

ARGUMENT

A. Nonresidents are Taxable in New York on Only Their New York Source Income, and New York is Substantially Justified in Denying Nonresidents a Deduction for Alimony Because Alimony is Not an Expense Incurred in Connection With the Production of the New York Source Income.

This Court has long recognized that the Privileges and Immunities Clause of Article IV, § 2, of the United States Constitution[6] safeguards the right of a resident of one state to pursue his livelihood in another state on terms of substantial equality with residents of the other state. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948) (state law requiring a nonresident's shrimp boat to pay a license fee 100 times greater than that paid by resident violated the Privileges and Immunities Clause); *Ward v. Maryland*, 79 U.S. 418, 430 (1870) (state merchant licensing scheme that imposed substantially higher license fees on nonresident merchants than on those residing in the state violated Privileges and Immunities Clause). Such right generally includes the right to be exempt from any higher taxes than are imposed by the other state on its own citizens. *Ward v. Maryland, supra.*[7] *See Austin v. New Hampshire*, 420 U.S. 656 (1975) (holding

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[6]"The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[7]This Court has concluded that for purposes of analyzing a state taxing scheme under the Privileges and Immunities Clause, the terms "citizen" and "resident" are essentially interchangeable. *Austin v. New Hampshire*, 420 U.S. 656, 662, n. 8 (1975); *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 78-79 (1920).

that New Hampshire's commuter income tax violated the Privileges and Immunities Clause where the state imposed a tax on nonresidents' New Hampshire-derived income in excess of $2,000, but effectively imposed no tax on the earned income of New Hampshire residents).

However, this Court has repeatedly recognized that the Privileges and Immunities Clause does not mandate absolute equality of treatment of residents and nonresidents for state income tax purposes where legitimate reasons exist justifying different treatment. Rather, "substantial equality of treatment for the citizens of the taxing State and nonresident taxpayers" is required. *Austin v. New Hampshire, supra*, 420 U.S. at 665. It is enough "that the State has secured a reasonably fair distribution of burdens," *Travelers' Insurance Company v. Connecticut*, 185 US 364, 371 (1902), considering the "practical effect and operation of the respective taxes as levied." *Shaffer v. Carter*, 252 U.S. 37, 56 (1920). The Privileges and Immunities Clause thus does not preclude:

> disparity of treatment in the many situations where there are perfectly valid independent reasons for it. . . . [T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Toomer v. Witsell, supra, 334 U.S. at 396 (footnote omitted). In other words, disparity in treatment between residents and nonresidents does not violate the Privileges and Immunities

Clause where (i) there is a substantial reason for the difference in treatment, and (ii) the discrimination practiced against nonresidents bears a substantial relationship to that reason. *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *see also Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 67 (1988) (the Privileges and Immunities Clause requires that the degree of discrimination bear a close relation to the state's substantial reasons).

As the New York Court of Appeals found, the difference between New York's income tax treatment of alimony paid by residents and nonresidents is based on the difference between residence tax jurisdiction and source tax jurisdiction -- a difference recognized by this Court, the United States and most other taxing jurisdictions. *See* M. McIntyre and R. Pomp, *State Income Tax Treatment of Residents and Nonresidents Under the Privileges and Immunities Clause*, 13 State Tax Notes 245, 246 (July 28, 1997). A state's jurisdiction over its residents is plenary, and a state may tax the income of a state resident from all sources, wherever earned, without offending the Constitution (residence taxation). *People of the State of New York ex rel. Cohn v. Graves*, 300 U.S. 308, 312-313 (1937); *Lawrence v. State Tax Commission*, 286 U.S. 276, 279 (1932); *Shaffer v. Carter*, 252 U.S. 37, 57 (1920). As stated in *Lawrence*:

> The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the

> state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government.

286 U.S. at 279. The state's relationship with a nonresident is on a substantially different footing. Consequently, the state's income tax jurisdiction is much more limited, generally encompassing income derived from in-state sources (source taxation). *International Harvester Co. v. Wisconsin Department of Taxation*, 322 U.S. 435, 441-442 (1944); *Shaffer v. Carter, supra*.

In *Shaffer v Carter*, this Court was presented with an Illinois resident who in 1916 derived income in excess of $1,500,000 from his Oklahoma oil business on which Oklahoma assessed an income tax in excess of $76,000. The taxpayer contended, among other things, that the Oklahoma levy violated the Privileges and Immunities Clause because it permitted residents to deduct losses wherever incurred but allowed nonresidents to deduct only losses incurred within Oklahoma. The Court rejected the contention, stating that the different treatment of nonresidents regarding losses not related to their Oklahoma source income was justified:

> The difference, however, is only such as arises naturally from the extent of the jurisdiction of the State in the two classes of cases, and cannot be regarded as an unfriendly or unreasonable discrimination. As to residents it may, and does, exert its taxing power over their income from all sources, whether within or without the State, and it accords to them a corresponding privilege of deducting their losses, wherever these accrue. As to non-residents, the jurisdiction extends

> only to their property owned within the State and their business, trade, or profession carried on therein, and the tax is only on such income as is derived from those sources. Hence there is no obligation to accord to them a deduction by reason of losses elsewhere incurred.

252 U.S. 37, 57.

Similarly, in *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), decided with *Shaffer*, this Court considered the validity of various aspects of New York's income tax treatment of nonresidents, including a provision which allowed nonresidents to claim deductions available to residents only if connected with income arising within New York. The deductions limited by such provision included deductions for trade or business or other profit-seeking expenses as well as for personal expenses such as charitable contributions and non-business interest, taxes, bad debts and casualty losses. Former New York Tax Law § 360(11) (McKinney 1920 Supp). This Court found no constitutional impediment to New York's nonresident deduction limitation, stating:

> [t]hat there is no unconstitutional discrimination against citizens of other States in confining the deduction of expenses, losses, etc., in the case of non-resident taxpayers, to such as are connected with income arising from sources within the taxing State, likewise is settled by [*Shaffer*].

252 U.S. at 75-76.

The New York Court of Appeals correctly summarized the relevant holdings of *Shaffer* and *Travis* as establishing that

limiting taxation of nonresidents to their in-state income is a sufficient justification for similarly limiting their deductions, including non-business deductions, to expenses incurred in producing that in-state income. 89 N.Y.2d at 288, 675 N.E.2d at 819, 653 N.Y.S.2d at 65. As stated by two leading commentators in the field of state taxation, "*Shaffer* and *Travis* support a State's refusal to allow a nonresident a proportionate share of the various personal deductions allowed residents." J. Hellerstein and W. Hellerstein, *State Taxation - II Sales and Use, Personal Income, and Death and Gift Taxes*, ¶ 20.06(2)(c), p. 20-38 (1992) (footnotes omitted).

New York's rationale for disallowing nonresidents any personal deductions was succinctly stated in 1959 in testimony before the House Judiciary Committee by New York's then Commissioner of Taxation and Finance:

> Since legally we do not and cannot recognize the existence of this [non-New York source] income, we have felt that, in general, we cannot recognize these other deductions which, in the main, are of a personal nature and are unconnected with the production of income in New York.

Statement of Hon. Joseph H. Murphy, Commissioner of Taxation and Finance and President, New York State Tax Commission, Hearing Before Subcommittee No. 2, Committee on Judiciary, House of Representatives, on H.J. Res. 33, *et al.* and H.R. 4174, *et al.*, Taxation of Income of Nonresidents, 86th Cong., 1st Sess., 98-99 (1959). More recently, two scholars who played a leading role in developing New York's 1987 plan for reform of family taxation have noted that New York's tax treatment of alimony is consistent with New York's taxation of

families generally. According to those commentators, alimony achieves the same result as marital income splitting (*i.e.*, taxing income to the person who enjoys its economic benefits), which New York allows only to residents. Extending the benefit of income splitting to nonresidents is inappropriate on tax policy grounds because nonresidents are taxed by New York on only a slice of their income—that derived from New York sources. M. McIntyre and R. Pomp, *State Income Tax Treatment of Residents and Nonresidents Under the Privileges and Immunities Clause, supra*, 13 State Tax Notes at 249-250; *see generally* M. McIntyre, *Tax Justice For Family Members After New York State Tax Reform*, 51 Alb. L. Rev. 789 (1987).

In summary dismissals decided after *Shaffer* and *Travis*, this Court has accommodated state distinctions between residents and nonresidents for income tax purposes based on the state's ability to tax the nonresident on only his in-state income. *See* J. Hellerstein and W. Hellerstein, *State Taxation-II Sales and Use, Personal Income and Death and Gift Taxes*, ¶ 20.06[3], p. 20-47 (1992). Thus, for example, in *Matter of Goodwin v. State Tax Commission*, 286 App. Div. 694, 146 N.Y.S.2d 172 (3d Dept. 1955), *aff'd*, 1 N.Y.2d 680, 133 N.E.2d 711, 150 N.Y.S.2d 203 (1956), *appeal dismissed for want of a substantial federal question*, 352 U.S. 805 (1956),[8] the taxpayer, a resident

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[8]This Court has repeatedly stated that its "summary dismissals are . . . to be taken as rulings on the merits . . . in the sense that they rejected the 'specific challenges presented in the statement of jurisdiction' and left 'undisturbed the judgment appealed from.' " *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 476-477 n. 20 (1979) (citation omitted), *quoting Mandel v. Bradley*, 432 U.S. 173, 176 (1977). *See R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 139, n. 7 (1986); *see also*

of New Jersey who practiced law in New York City, was denied deductions for real estate taxes on his New Jersey home, interest on the home mortgage, medical expenses and life insurance premiums. The denial was based on former Tax Law § 360(11) (McKinney 1954), which provision this Court had upheld in *Travis*. New York disallowed these deductions to the *Goodwin* taxpayer because they were not connected with the taxpayer's New York source income. The taxpayer contended that former New York Tax Law § 360(11) discriminated against nonresidents in violation of the Privileges and Immunities Clause. The New York Appellate Division, Third Department, upheld the provision, relying on *Shaffer* and *Travis*. 286 App. Div. at 696-698, 146 N.Y.S.2d at 176-178. The Court of Appeals affirmed the decision without opinion, 1 N.Y.2d 680, 133 N.E.2d 711, 150 N.Y.S.2d 203 (1956), and this Court dismissed the taxpayer's appeal from the Court of Appeals for want of a substantial federal question.

Likewise, in *Davis v. Franchise Tax Board*, 71 Cal. App. 3d 998, 139 Cal. Rptr. 797 (Ct. App. 3d Dist. 1977), *appeal dismissed for want of a substantial federal question*, 434 U.S. 1055 (1978), this Court dismissed an appeal from a decision of the California Court of Appeal upholding that state's denial of

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Hicks v. Miranda, 422 U.S. 332, 343-345 (1975) (lower courts bound by this Court's summary decisions). While this Court has stated that "[t]hey do not . . . have the same precedential value . . . as does an opinion of this Court after briefing and oral arguments on the merits," a summary dismissal does represent a view that the judgment appealed from was correct as to those federal questions raised and necessary to the decision. *Yakima Indian Nation, supra*, 439 U.S. at 476-477 n. 20; *see Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974).

income averaging to nonresidents. At the time, California's income tax rates applied only to the nonresidents' California source income, thus ignoring out-of-state income in determining the nonresidents' tax bracket. Income averaging was intended to reduce the hardship caused by fluctuations in income and the resulting variations in the applicable tax bracket. 71 Cal. App. 3d at 1001, 139 Cal. Rptr. at 798. The California court found that, under California's tax scheme, a nonresident could show a fluctuating California income even though his total income from all sources did not vary from year to year. The court found that a nonresident's use of income averaging could thus enable the nonresident to utilize a tax bracket that did not necessarily reflect his overall ability to pay. 71 Cal. App. 3d at 1003, 139 Cal. Rptr. at 799. Accordingly, the structure of California's general income tax treatment of nonresidents provided a substantial reason, independent of the mere fact of nonresidency, for denying income averaging to nonresidents.[9]

Other state courts have concluded that limitations on a state's tax jurisdiction over nonresidents justify differences in the tax treatment of residents and nonresidents. In *Taylor v. Conta*, 106 Wis. 2d 321, 316 N.W.2d 814 (1982), the Supreme Court of

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[9]This Court's affirmance by an equally divided Court of the decision of the Supreme Court of South Carolina in *Spencer v. South Carolina Tax Commission*, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd by an equally divided Court*, 471 U.S. 82 (1985), a case relied upon by petitioners (Pet. Br., p. 10), was limited to the issue of attorney's fees under 42 U.S.C. § 1988 and did not address the holding of the Supreme Court of South Carolina that such state's denial of non-business deductions to nonresidents in the absence of reciprocity violated the Privileges and Immunities Clause. *See* Petition for a Writ of Certiorari to Supreme Court of South Carolina, at I ("Questions Presented").

Wisconsin upheld Wisconsin's denial of a moving expense deduction for expenses incurred in commencing employment outside the state. The court, relying on *Shaffer* and *Travis*, held that since Wisconsin did not tax income earned by former residents in their new state of residence, Wisconsin was not constitutionally required to allow deductions for expenses incurred to generate income that was beyond its taxing jurisdiction. 106 Wis. 2d at 352, 316 N.W.2d at 830.[10]

The Wisconsin court also upheld the constitutionality of that state's denial of a tax deferral on gain realized on the sale of a Wisconsin residence where the replacement residence purchased by the taxpayer was located outside Wisconsin. Former Wisconsin residents contended that such provision violated the Privileges and Immunities Clause. The court identified two justifications for the denial of the tax deferral when the new residence was located outside the state: unless the state taxed the former residents immediately, they would escape all Wisconsin tax on the gain while those continuing to reside in Wisconsin could ultimately be taxable, and forcing the state to keep track of former residents until the deferred gain was recognized was administratively burdensome. By denying the tax deferral to the former resident, the court found that Wisconsin treated the resident and the former resident "as fairly as possible within our

[10]*See also Harris v. Commissioner of Revenue*, 257 N.W.2d 568 (Minn. 1977) (upholding disallowance of moving expense deduction); *but cf. Matter of Golden v. Tully*, 58 N.Y.2d 1047, 449 N.E.2d 406, 462 N.Y.S.2d 626 (1983) (invalidating disallowance of nonresident moving expense deduction where no justification other than nonresidence was proffered).

federal system." *Taylor v. Conta*, 106 Wis. 2d at 346, 316 N.W.2d at 827.[11]

Similarly, in *Maland v. Commissioner of Revenue*, 331 N.W.2d 486 (Minn. 1983), the Supreme Court of Minnesota upheld against a Privileges and Immunities Clause challenge an estate tax marital exemption limited to property passing to the surviving spouse of a decedent domiciled in Minnesota at the time of his death. The court found that the different treatment of resident and nonresident decedents was justified because the resident's taxable estate included tangible and intangible property located anywhere while the nonresident decedent's estate included only tangible property located in Minnesota. The court noted that as a result, because of the state's graduated estate tax, a nonresident was likely to be taxed at a lower rate than a resident on assets of equal value. The court stated that denying the marital exemption was an attempt to compensate for this difference, and was sufficiently closely related to such objective to pass muster under the Privileges and Immunities Clause. 331 N.W.2d at 489.

Moreover, although the Privileges and Immunities Clause does not apply to the United States, it is worth noting that New York's income tax policy regarding alimony paid by nonresidents is entirely consistent with federal tax law, which completely denies the alimony deduction to nonresident aliens, regardless of the residence of the recipient. *See* 26 U.S.C.

[11]*But see Kuhnen v. Musolf*, 143 Wis. 2d 134, 420 N.W.2d 401 (Ct. App. 1988), *review denied*, 143 Wis. 2d 910, 422 N.W.2d 860 (1988), where an intermediate appellate court came to a different conclusion regarding the gain deferral issue based on a different record.

§ 873(a) (deductions limited to those connected with income that is effectively connected with a U.S. trade or business); 26 U.S.C. § 871(a)(1) (U.S. source income not effectively connected with a U.S. trade or business is taxable at a flat rate with no deductions). Additionally, permitting the taxing jurisdiction that is the source of the income to disregard nonbusiness deductions of nonresidents is allowed under well-settled norms of international taxation. *See* M. McIntyre and R. Pomp, *State Income Tax Treatment of Residents and Nonresidents Under the Privileges and Immunities Clause, supra*, 13 State Tax Notes at 247-249. Accordingly, the legitimacy of differing tax treatment of residents and nonresidents based upon the state's inability to tax nonresidents on their non-state source income is well established.[12]

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[12]California and West Virginia also do not allow nonresident taxpayers to reduce state source income by alimony paid. Cal. Rev. and Tax. Code § 17302 (1988 and 1996 Supp); W. Va. Code Ann. § 11-21-32(b)(4) (1995). Additionally, Alabama limits the alimony deduction to residents and Wisconsin requires nonresidents to add back alimony paid to their federal adjusted gross income for state tax purposes. Ala. Code § 40-18-15(18) (1993 and 1996 Supp); Wis. Stat. Ann. § 71.05(6)(a) (West 1989 and 1996 Supp). Illinois and Ohio apparently do not allocate alimony deductions to in-state sources. Ill. Comp. Stat. Ann. c. 35, § 5/301(c)(2)(A) (Smith-Hurd 1996 and 1997 Supp); Ohio Rev. Code Ann. § 5747.20(B)(6) (Page 1996). Pennsylvania does not allow residents or nonresidents to deduct alimony. Pa. Stat. Ann. §§ 3402-307, 3402-308 (Purdon 1995 and 1997 Supp). A few states allow nonresidents to deduct alimony in proportion to the part of their income derived from in-state sources. *See, e.g.*, Ga. Code Ann. § 48-7-30(d)(2) (Michie 1995 and 1996 Supp); La. Rev. Stat. Ann. tit. 47, §§ 59, 243(B), 244(A) (West 1990 and 1997 Supp); Or. Rev. Stat. § 316.130(2)(c)(A) (1995 and 1996 Supp). A number of states tax nonresidents on their state-source income but do not explicitly allocate alimony deductions to in-state or out-of-state sources. *See, e.g.*, Colo. Rev. Stat. § 39-22-109 (1994 and 1996 Supp); Conn. Gen. Stat. Ann. §§ 12-700(b), 12-711 (West 1993 and 1997 Supp); Del. Code Ann. tit. 30, §§ 1121, 1124 (Michie 1985 and 1996 Supp); Ind. Stat. Ann. §§ 6-3-2-1, 6-3-2-2, 6-3-2-2.2 (Burns 1995 and 1996 Supp); Iowa Code Ann. §§ 422.5(1)(j), 422.8 (West 1990 and 1997 Supp); Mo. Ann. Stat. §§ 143.041, 143.081 (Vernon 1996 and 1997 Supp); Okla. Stat. Ann. tit. 68, §§ 2355, 2362 (West 1992 and 1977 Supp); Utah Code Ann. §§ 59-10-116, 59-10-117 (Michie 1996). Alaska, Florida, Nevada, South Dakota, Texas, Washington (State) and Wyoming have no personal income tax, and New Hampshire and Tennessee do not tax earned income. N.H. Rev. Stat. Ann. § 77-4 (1991 and 1996 Supp); Tenn. Code Ann. § 67-2-102 (Michie 1994 and 1996 Supp).

Petitioners rely heavily (Pet. Br., pp. 8-9, 11) on another portion of this Court's opinion in *Travis v. Yale & Towne Mfg. Co., supra*, striking down New York's denial of personal exemptions to nonresidents, 252 U.S. at 77-82. In the case of residents, New York exempted from taxation $1,000 of income in the case of a single person and $2,000 in the case of a married person, and $200 for each additional dependent. A nonresident taxpayer had no similar personal exemptions. 252 U.S. at 79. This Court found that denying personal exemptions to nonresidents while allowing them to residents violated the Privileges and Immunities Clause, because whether the nonresident taxpayers "must pay a tax upon the first $1,000 or $2,000 of income, while their associates and competitors who reside in New York do not, makes a substantial difference" for which there was no adequate justification. 252 U.S. at 80.

Petitioners' reliance on this aspect of *Travis* is misplaced.The personal exemptions at issue in *Travis* are essentially different from the alimony deduction at issue in the present case. As the

New York Appellate Division recognized in *Goodwin, supra*, 286 App. Div. at 702-703, 146 N.Y.S.2d at 181, personal exemptions are allowed as a flat amount, without regard to the making of expenditures of any kind by the taxpayer. Personal exemptions immunize a portion of the taxpayer's income from liability solely on the basis of his personal status. *See* W. Hellerstein, *Some Reflections on the State Taxation of a Nonresident's Personal Income*, 72 Mich. L. Rev. 1309, 1343 (1974). Personal exemptions affect the rate structure by creating a zero bracket amount equal to the amount of the exemption. Because New York could not directly tax nonresidents at a higher rate than residents having the same income, this Court in *Travis* found that it could not do so indirectly through the simple expedient of denying personal exemptions to nonresidents. See M. McIntyre and R. Pomp, *State Income Tax Treatment of Residents and Nonresidents Under The Privileges and Immunities Clause, supra*, 13 State Tax Notes at 252, n. 52.

On the other hand, deductions, such as the alimony deduction at issue in the present case, represent allowances for expenses actually paid or incurred by the taxpayer, which are allowable for a variety of different policy reasons. The alimony deduction at issue here is not equivalent to a personal exemption and does not affect New York's income tax rate structure because it is not an allowance in a flat amount available to all residents without regard to their expenses. Accordingly, the personal exemptions at issue in *Travis* are not analogous to the alimony deduction at issue in this case.

This Court saw no inconsistency in *Travis* in upholding New York's disallowance of nonresident deductions for income-producing and personal expenses unrelated to New York income while at the same time striking down New York's disallowance

of the nonresident personal exemptions. Contrary to petitioners' argument, this Court's reasoning in *Travis* invalidating New York's denial of the nonresident personal exemptions is inapplicable here. Rather, as the court below found, the *Travis* holding relevant to this case is the holding validating New York's denial to nonresidents of deductions for expenses not connected with the production of their New York income.

Petitioners further contend that the invalidity of New York's statutory scheme is demonstrated by a hypothetical example in which a nonresident paying alimony is more heavily taxed than a New York resident. Unlike the present case, the hypothetical case posits a nonresident taxpayer paying alimony whose total income consists of New York source wages. The operation of Tax Law § 631(b)(6) results in the hypothetical nonresident's tax liability exceeding that of a comparable New York resident (Pet. Br., pp. 13-14). Petitioners' hypothetical example emphasizes that only in such a case would New York residents be favored, because only then would the nonresidents be more heavily taxed than similarly situated residents with the same income and expenses. Such difference in treatment is permitted by *Shaffer* and *Travis* where the nonresident's disallowed expenses are not incurred in connection with the production of the in-state income.

In any event, the hypothetical case is not this case. Here, Mr. Lunding derived approximately half of his income from New York sources. Petitioners paid only about 51 percent of the tax that would have been due from a resident married couple with the same income and expenses (28a). Thus, petitioners were more favorably treated than comparable New York residents. *See* M. McIntyre and R. Pomp, *State Income Tax*

Treatment of Residents and Nonresidents Under the Privileges and Immunities Clause, supra, 13 State Tax Notes at 252-253.

Finally, contrary to petitioners' argument (Pet. Br., p. 11), the holding of the court below was not premised upon the assumption or speculation that petitioners had untaxed income in some other state justifying discriminatory treatment in New York. Instead, the Court of Appeals, following *Shaffer* and *Travis*, held that New York was substantially justified in denying petitioners' alimony deduction for purposes of computing their New York source income because alimony was not an expense incurred in connection with the production of their New York source income. New York's justification does not depend on the existence of any untaxed non-New York income. Because it is undisputed that the alimony payments at issue in this case were not incurred in connection with the production of petitioners' New York source income, New York was entirely justified in disregarding them.

B. New York May Validly Deny the Alimony Deduction to a Nonresident Because a Nonresident's Alimony Payments are Personal Expenses Related to the Nonresident's Life in His Home State Over Which New York Has No Jurisdiction and Which New York Should Not Be Required to Consider.

In the present case, the New York Court of Appeals also concluded that Tax Law § 631(b)(6) validly precluded petitioners from deducting alimony in computing their New York source income based on its view that alimony is a personal expense which is not incurred in connection with the production of New York source income but which is wholly linked to personal activities outside New York. The Court noted that, in this

respect, the alimony payments were like the expenditures for life insurance, out-of-state real property taxes and medical treatment involved in *Goodwin* (8a).

Unlike residents, over whom New York has complete and plenary tax jurisdiction, the nonresident who simply works in New York presents to New York only the employment aspect of his life. New York need not concern itself with the fact that the nonresident has a personal life in another state, and should not be required to take account of the nonresident's personal expenses having nothing to do with the generation of his New York income. New York instead should be allowed to leave to the state of residence all policy determinations regarding which personal expenses should be allowed as income tax deductions to that state's residents.

A number of state courts have approved the denial to nonresidents of personal deductions while allowing them to residents, and this Court has not invalidated this approach, choosing instead to dismiss the nonresidents' appeals. In *Matter of Goodwin v. State Tax Commission, supra*, the New York Appellate Division relied heavily upon the fact that the deductions there at issue (real property tax on out-of-state residence, mortgage interest, medical expenses and life insurance premiums) were personal expenses unrelated to the taxpayer's New York activities. Regarding the fact that residents were allowed such deductions even in the absence of a connection to their income producing activities, the court stated that the factor of residence had an obvious connection with the allowance of the personal expense deductions at issue, which, if allowed as deductions at all, should be allowed by the state of the taxpayer's residence:

> The expenditures are properly associated with the place where the taxpayer resides. They all relate to the personal activities of the taxpayer and his personal activities must be deemed to take place in the State of his residence, the State in which his life is centered. The expenditures in controversy in this case are clearly a part of the petitioner's personal activities in his home State.

286 App. Div. at 701, 146 N.Y.2d at 180. Additionally, the court noted that the deductions at issue each embodied a governmental policy designed to serve a legitimate social end and that such policies were peculiarly related to the factor of residence within the state. The court found that the deductions could thus be limited to state residents, stating that in the exercise of its general governmental power to advance the welfare of its residents, the state could give aid and encouragement of the character embodied in the tax deductions to its own residents without being constitutionally required to extend similar aid or encouragement to residents of other states. 286 App. Div. at 702, 146 N.Y.S.2d at 180. *See also Wilson v. Department of Revenue*, 267 Or. 103, 514 P.2d 1334 (1973), *appeal dismissed for want of a substantial federal question*, 416 U.S. 964 (1974) (upholding provision limiting nonresident deductions to those connected with state source income, although residents were allowed certain non-income related personal deductions); *accord Stiles v. Currie*, 254 N.C. 197, 118 S.E.2d 428 (1961) (same).

Similarly, in *Lung v. O'Chesky*, 94 N.M. 802, 617 P.2d 1317 (1980), *appeal dismissed for want of a substantial federal question*, 450 U.S. 961 (1981), the Supreme Court of New Mexico upheld a New Mexico tax statute that denied to

nonresidents grocery and medical tax rebates given to New Mexico residents. The court found that the state's objective was to grant relief from gross receipts and property taxes to low-income individuals who actually paid those taxes. The court stated that the Legislature could reasonably believe that nonresidents did not actually pay those taxes, so rebates given to them would not afford relief for monies exacted by New Mexico. 94 N.M. at 805, 617 P.2d at 1320.

Likewise, in *Anderson v. Tiemann*, 182 Neb. 393, 155 N.W.2d 322 (1967), *appeal dismissed for want of a substantial federal question*, 390 U.S. 714 (1968), the Supreme Court of Nebraska upheld against a Privileges and Immunities Clause challenge that state's allowance of a food sales tax credit only to residents on the ground that food purchases for personal use are so closely related to the state of residence that any credit should be allowed only by such state. 182 Neb. at 407-408, 155 N.W.2d at 332.[13]

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[13]*See also Baker v. Matheson*, 607 P.2d 233 (Utah 1979) (upholding limitation of general fund rebates to residents to compensate them for increased housing costs); *Rubin v. Glaser*, 83 N.J. 299, 416 A.2d 382 (1980), *appeal dismissed for want of a substantial federal question*, 449 U.S. 977 (1980) (upholding homestead tax rebate limited to residents' principal residence); *Berry v. State Tax Commission*, 241 Or. 580, 397 P.2d 780 (1964), *appeal dismissed for want of a substantial federal question*, 382 U.S. 16 (1965) (upholding disallowance of nonresidents' personal deductions, including medical expenses and interest on out-of-state loans). *But see Wood v. Department of Revenue*, 305 Or. 23, 749 P.2d 1169 (1988) (disallowance of nonresident's alimony deduction pursuant to tax statute which allowed nonresidents to deduct only amounts attributable to their Oregon-source income

Goodwin. Lung and *Anderson* establish the proposition that, in furtherance of their sovereign powers to provide public benefits and services to those residing within the territories that they govern, states may limit personal deductions, such as the deduction for alimony, to residents and not be in violation of the Privileges and Immunities Clause. As was recognized in *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 383 (1978), states must be able to distinguish between their residents and residents of other states for some purposes if states are to survive as sovereign political entities in our federal system. *Id.* at 383 (holding that certain rights and benefits, such as voting and holding elective office, may properly be limited to residents); *see also* J. Varat, *State "Citizenship" and Interstate Equality*, 48 U. Chi. L. Rev. 487, 490 (1981) (Privileges and Immunities Clause cannot be absolute, because fulfillment of the fundamental obligation of state government -- to care for the state's own residents -- depends to some degree on the ability to withhold from others what a state provides to its own).

It is for this reason, among others, that a"virtually *per se* rule of invalidity" akin to that applied under the Commerce Clause to state taxes that patently discriminate against interstate commerce, *see. e.g.. Associated Industries of Missouri v. Lohman.* 511 U.S. 641, 647 (1994), should not be applied to state taxes under the Privileges and Immunities Clause. The two clauses have different aims and se different standards for state conduct. *United Building and Construction Trades Council of Camden*

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held, without extensive analysis, to violate the Privileges and Immunities Clause); *Borden v Selden*, 259 Iowa 808, 146 N.W.2d 306 (1966) (land tax credit available only to resident owners of Iowa land violated Privileges and Immunities Clause).

County v. Mayor and Council of the City of Camden, 465 U.S. 208, 219-220 (1984) (declining to transfer mechanically into the Privileges and Immunities Clause an analysis fashioned to fit the Commerce Clause). The Commerce Clause applies to one subject only -- interstate commerce -- and in its Commerce Clause jurisprudence, this Court has determined that state laws which discriminate against interstate commerce are almost never valid. The Privileges and Immunities Clause, on the other hand, applies to a variety of different subjects "bearing on the vitality of the Nation as a single entity," *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. at 383, where distinctions between residents and nonresidents may sometimes be appropriate. Accordingly, this Court's existing standard of review under the Privileges and Immunities Clause recognizes that the Clause should not automatically invalidate all state differences in treatment of residents and nonresidents. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948).

Moreover, this Court's Commerce Clause interpretations are subject to legislative review by Congress, allowing the states an avenue of political recourse from an adverse decision. The inability of the states to persuade Congress to change legislatively an adverse decision under the Privileges and Immunities Clause further justifies this Court's application of a less rigorous standard of review under the Privileges and Immunities Clause than under the Commerce Clause. *cf. Quill Corp. v. North Dakota.* 504 U.S. 298, 305 (1992) (in the exercise of its commerce power, Congress may authorize state actions that burden interstate commerce, but Congress cannot authorize violations of the Due Process Clause).

Petitioners contend (Pet. Br., pp. 11-12) that the Court of Appeals was wrong to say that the alimony payments were

personal expenses wholly linked to Mr. Lunding's personal activities outside New York. Petitioners assert that a New York link existed because such payments were mandated by a final Connecticut court judgment which was entitled to full faith and credit in New York and every other state. However, such link is too attenuated to be constitutionally significant. The alimony payments were not ordinary and necessary expenses paid or incurred in carrying on Mr. Lunding's New York trade or business *(see, e.g.*, 26 U.S.C. § 162[a]) or for the production of his New York income *(see, e.g.*, 26 U.S.C. § 212[1]). Although the amount of the alimony payments may have been based on Mr. Lunding's income from New York (and elsewhere), the origin of the claim giving rise to the alimony obligations was entirely unrelated to Mr. Lunding's income producing activities in New York. *See, e.g., United States v. Gilmore*, 372 U.S. 39 (1963) (the origin of the claims in litigation resulting from marital dissolution was personal, so the expenses of contesting the litigation were nondeductible personal expenses). The alimony obligation simply had nothing to do with where Mr. Lunding earned his income. Connecticut was the state of Mr. Lunding's residence during 1990, the state in which his life was centered. Accordingly, the Court of Appeals was correct in finding the alimony payments "wholly linked" to personal activities outside New York.[14]

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[14]Additionally, other factors, not affecting the outcome of this case, further illustrate the lack of connection between New York and Mr. Lunding's alimony payments. Connecticut, not New York, was the forum of the former marriage, where the marital obligation culminating in the alimony obligation arose (18a). Connecticut was the forum of the divorce, and the alimony was payable pursuant to a Connecticut Superior Court judgment (18a). Connecticut was the state of the former wife's residence during 1990 (19a).

Finally, petitioners argue that Tax Law § 631(b)(6) applies based solely on the residence of the alimony payor, without regard to whether the marriage and divorce occurred in New York (Pet. Br., p. 11), or, for that matter, whether the alimony recipient resides in New York. Although accurate, petitioners' observation is legally irrelevant. Regardless of where the marriage and divorce occurred or where the alimony recipient resides, the Privileges and Immunities Clause permits New York to limit personal deductions, including alimony, to residents and leave residents of other states to whatever tax relief their own states may afford them. Accordingly, New York's income tax treatment of alimony paid by nonresidents does not violate the Privileges and Immunities Clause.

CONCLUSION

FOR THE FOREGOING REASONS, THE ORDER OF THE NEW YORK STATE COURT OF APPEALS DECLARING TAX LAW § 631(b)(6) TO BE CONSTITUTIONAL SHOULD BE AFFIRMED.

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August 1, 1997

Respectfully submitted,

DENNIS C. VACCO
Attorney General of the
State of New York
Attorney for Respondent
Commissioner of Taxation
and Finance

BARBARA G. BILLET
Solicitor General and
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

ANDREW D. BING
Assistant Attorney General

of Counsel